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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

EDDY GUZMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Decision and Opinion of the State of New York, Supreme Court, Fourth Department, Appellate Division, based solely upon the particular facts involved, was properly decided within the purview of the Fourth Amendment to the United States Constitution.

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OPINIONS BELOW

The Memorandum Opinion of the Appellate Division of the Supreme Court, State of New York, Fourth Department is reported at *People v. Guzman*, 551 N.Y.S. 2d 709 (N.Y. App. Div. 1990). The certificate of the Supreme Court, Appellate Division, Fourth Department, dated March 22, 1990, granting Petitioner permission to appeal to the New York State Court of Appeals, appears as #2 of Petitioner's appendix. The Order and Adjudgment of the New York State Court of Appeals dismissing the Petitioner's appeal, dated July 5, 1990, appears as #3 of Petitioner's appendix.

JURISDICTION

The Final Order of the Court of Appeals of the State of New York dismissing Petitioner's appeal is dated July 5, 1990. The Petition for a Writ of Certiorari, filed on December 7, 1990 and re-docketed on February 6, 1991, was not filed timely within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution in pertinent part provides:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."

The Fourteenth Amendment to the United States Constitution in pertinent part provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 12 of the New York State Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."
>
> Adopted November 8, 1938, eff. January 1, 1939.

STATEMENT OF THE CASE

On June 22, 1988, Defendant-Appellant Eddy Guzman (hereinafter Defendant), was driving a vehicle on the New York State Thruway in the vicinity of Brutus, New York. In the vehicle with him were a cousin, Jose Guzman, and a friend, Jose Rodriguez. The vehicle was identified as a Buffalo Airport Taxi, which he had permission to be using.

At the time, Guzman was a twenty-seven year old Hispanic male (Record on Appeal, page 4, hereinafter referred to as R.A.) from the Dominican Republic with one prior police arrest. The companions were also Hispanic males.

At approximately 8:15 a.m. the vehicle was stopped for speeding by New York State Trooper Jerome Crawford (hereinafter referred to as Crawford), who at the time was on routine highway patrol (R.A. 52). The speeding ticket was issued approximately three hours later at the New York State Police substation (R.A. 67).

Crawford requested a license and registration of the Defendant who was driving the vehicle. The Defendant produced a license and taxi certificate (R.A. 19). At this same time, Crawford checked out the interior of the vehicle (R.A. 58-59). Crawford then directed that the Defendant go to his police vehicle, while Crawford walked backwards keeping the Defendant in front of him at all times. Once inside the police vehicle, he proceeded to interrogate him on matters unrelated to the speeding violation (R.A. 19; R.A. 20; and R.A. 77). All of the Defendant's information and documentation checked out and Crawford verified that the Defendant was not wanted and the vehicle was not stolen (R.A. 20). Crawford had no information regarding the three Hispanics or the vehicle (R.A. 54), and aside from the speeding, the three had done nothing wrong (R.A. 54).

After verifying the Defendant's credentials and having no further information, Crawford continued to interrogate the Defendant when he observed "some furtive movements which raised my suspicions." (R.A. 20). Crawford then interrogated the Defendant with regard to "any type of contraband, guns, drugs, anything of the nature." (R.A. 20 and R.A. 22). After all the foregoing, Crawford asked, "Would he mind if I took a look in the car?" and the Defendant reportedly said, "No, go ahead." (R.A. 20).

Prior to this point, Crawford had contacted State Police Headquarters in Syracuse for an S & R on a Hispanic male (R.A. 63) and had not received any negative information regarding the Defendant (R.A. 65; R.A. 66). Yet the speeding ticket was not issued until the parties were back at the substation (R.A. 67) at approximately 11:00 a.m. Crawford directed the Defendant to proceed to the passenger side of the vehicle (R.A. 22) where he ordered the other two passengers to step out of the car (R.A. 23 and R.A. 70). Crawford observed that the passenger in the back seat of the vehicle, who had made some furtive movements, was putting his shoes on prior to exiting the vehicle (R.A. 41; R.A. 56 and R.A. 66-67).

Crawford then frisked them and ordered them to stand at the front of the vehicle (R.A. 70; R.A. 71; R.A. 72 and R.A. 73). The Defendant was frisked at the same time (R.A. 62; R.A. 75 and R.A. 76). Crawford never advised the Defendant of his right to talk to a lawyer or his right of refusal prior to commencing his in-depth search of the vehicle (R.A. 75). After ordering the three persons to stand in front of the vehicle, Crawford commenced his search and located contraband underneath the rear seat of the vehicle (R.A. 24).

On these facts, the suppression court denied the Defendant's motion to suppress the seized contraband. Subsequently, the Defendant entered a plea of guilty to criminal possession of a controlled substance in the second degree in violation of Section 220.18 of the New York State Penal Law.

The Fourth Department, Appellate Division of the Supreme Court of the State of New York reversed on the law and the facts and dismissed the indictment. The Fourth Department found that on the record the police officer's conduct exceeded the permissible constitutional bounds and Defendant's conduct did nothing to arouse the officer's suspicion that he was engaged in criminal activity. *People v. Guzman*, 551 N.Y.S. 2d 709 (N.Y. App. Div. 1990).

In a dissenting opinion, Associate Justice Elizabeth W Pine found that while the record proferred no distinction between "looking in the car" and "searching the car", the record did support the findings of the suppression court that the Defendant voluntarily consented to the search of his car. Subsequently, Justice Pine granted Petitioner herein, leave to appeal to the State of New York Court of Appeals.

The State of New York, Court of Appeals dismissed Petitioner's appeal on the ground that reversal by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal." [CPL Section 450.90 (2)(a), pursuant to Section 500.4 of the Rules of the Court of Appeals].

REASONS FOR DENYING THE WRIT

Petitioner contends that the State of New York Court of Appeals' effective affirmance of the opinion and decision of the Supreme Court, Appellate Division, Fourth Department directly conflicts with the guarantees and protections of the Fourth Amendment to the United States Constitution and the United States Supreme Court decisions regarding the issues herein.

The Respondent cannot agree. The decision and opinion of the Fourth Department turns solely upon an analysis of the particular facts involved, predicated upon the guarantees and protections of the Fourth Amendment to the United States Constitution and is clearly distinguishable on the facts from Petitioner's allegedly conflicting decisions. Such fact specific issues rarely warrant this Court's increasingly taxed time and effort. *Florida v. Rodriguez*, 469 U.S. 1, 12 (1984) (Stevens, *J.* dissenting); *Massachusetts v. Sheppard*, 486 U.S. 981, 988 n.5 (1984).

Further, Petitioner's assertion that the decision herein has failed to recognize "drug courier profile" cases is without merit since the issue was neither raised below nor supported by the record. Based upon the foregoing this Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. The officer's conduct constituted an unreasonable investigative interrogation within the meaning of the Fourth Amendment.

Respondent concedes that Crawford while on routine highway patrol duty, had the authority to stop him for speeding. *People v. Ingle,* 36 N.Y. 2d 413 (1975). Respondent further concedes that having stopped the vehicle for speeding, Crawford had the authority to direct the driver to step out of the vehicle and make reasonable inquiries. *Pennsylvania v. Mimms,* 434 U.S. 106 (1977); *People v. Harrison,* 57 N.Y. 2d 470 (1982).

The Fourth Amendment requires that such an investigative detention must be brief, lasting no longer than is necessary and limited to the purpose of the stop. *Florida v. Royer,* 460 U.S. 491, 500 (1983). The stop and inquiry must be reasonably related in scope to the justification for their initiation. *United States v. Brignoni-Prince,* 422 U.S. 873, 881 (1975) (citation omitted).

In the case at bar, Crawford asked Respondent for his driver's license and registration. While responding to this request, Crawford checked out the occupants and interior of the vehicle. Respondent produced his license and the taxi certificate. From that point on Crawford was no longer dealing with a speeding violation, but rather was engaged in a criminal investigation without benefit of any information, credible foundation or suspicious action. Crawford directed the Respondent to his police vehicle and while the Respondent was proceeding to the vehicle, Crawford backed up on the roadway so that he would be facing him all the time.

Once inside the police vehicle, Crawford interrogated the Respondent, not about the vehicle he was driving but rather of a general investigative nature. After Crawford learned, as a result of a radio verification, that Respondent's license and taxi certificate checked out and that Respondent was not wanted for anything he continued to interrogate Respondent with regard to commission of a crime, *i.e.*, "carrying any type of contraband, guns, drugs, anything of that nature". This further act by Crawford, with no articulable facts and no information and no foundation other than his personal suspicion to believe that a crime had been or was to be committed rendered further police action unreasonable and in violation of the Fourth Amendment.

Petitioner contends that the alleged suspicious activity (referred to as furtive movements below) by one of the occupants remaining in the vehicle, created a totality of the circumstances which established that criminal activity was afoot and that contraband may be being transported in the vehicle. However, these alleged furtive movements alone, susceptible of innocent interpretation, cannot form a sufficient basis for an expanded investigative interrogation outside the scope of the initial traffic stop for speeding. See, *People v. Sobotakar*, 43 N.Y. 2d 559 (1978); *People v. Howard*, 50 N.Y. 2d 583 (1980).

Petitioner cites *Sobotakar* as standing for the proposition that when an officer possesses a reasonable suspicion of criminal activity based on "specific articulable facts which, taken together with rational inferences from those facts," an intrusion is reasonably warranted (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). However, Petitioner fails to recognize that *Sobotakar* further states that:

> . . . 'reasonable suspicion' has been aptly defined as 'quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand' (citation omitted). The requisite knowledge must be more than subjective; it should have at least some demonstrable roots. Mere 'hunch' or 'gut reaction' will not do (Compare *e.g., People v. Erwin,* 42 N.Y. 2d 1064 [driving through a red light]; . . . see, also, *Pennsylvania v. Mimms,* 434 U.S. 106 [operating with expired license plate justified stop]).

Id. at 564.

In *Sobotakar,* the Court of Appeals found that a surveillance team of police officers in an area where several burglaries had recently been reported did not have a sufficient basis for an investigative stop and inquiry where they observed such furtive movements as an automobile proceeding slowly and pausing twice where the three male occupants turned their heads and glanced in the direction of two separate bars. *Id.* at 564. Similarly, in the case at bar, Crawford had no more than a subjective hunch or gut reaction when he impermissibly instituted a criminal investigation beyond the scope of the traffic stop, in violation of the Fourth Amendment. Furthermore, the alleged furtive movements were not attributed to the Defendant.

Further cases cited by Petitioner are inapposite and clearly distinguishable on the facts, *e.g., People v. Leung,* 68 N.Y. 2d 734 (1986) (police officers patrolling in area known for drug activity, having observed defendant pass envelope similar to those used in drug transactions coupled with defendant's immediate flight upon officers identifying themselves constituted necessary reasonable suspicion); *People v. Jonn BB.,* 56 N.Y. 2d 482 (1982) (uniform, nonarbitrary, nondiscriminatory traffic stop of

all vehicles in response to several burglaries in sparsely populated area of vacant summer homes); *People v. Chestnut*, 36 N.Y. 2d 971 (1975) (probable cause to search vehicle where an odor of marijuana emanated from open window); *People v. Troiano*, 35 N.Y. 2d 476 (1974) (search of defendant incident to lawful arrest warrant earlier authorized); *People v. Marsh*, 20 N.Y. 2d 98 (1967) (search incident to lawful arrest warrant earlier authorized); *People v. Lyng*, 104 A.D. 2d 699 (N.Y. App. Div. 1984) (defendant with cut hand and pockets bulging with what sounded like coins, walking toward taxi outside of closed service station at 3:00 a.m. coupled with police awareness that recent burglaries involved theft of coins constituted reasonable suspicion); *People v. McLaughlin*, 48 A.D. 2d 722 (N.Y. App. Div. 1975) (search incident to lawful arrest resulting in rounds of ammunition from defendant's pocket constituted probable cause to search vehicle); *People v. LaBelle*, 37 A.D. 2d 135 (N.Y. App. Div. 1971) (blood stains in plain view on vehicle dashboard coupled with reasonable suspicion that vehicle was involved in particularly bloody homicide constituted probable cause to search vehicle).

II. The State of New York, Court of Appeals correctly dismissed Petitioner's appeal on the ground that the decision turned solely upon an analysis of the particular facts involved.

A State of New York, Supreme Court, Appellate Division determination based solely upon the facts or upon a mixed question of law and fact is beyond the review power of the State of New York, Court of Appeals. *People v. Harrison*, 57 N.Y. 2d 470 (1982). "Where ... reasonable minds may differ as to the inferences ... we may not interfere with the ... findings of that Court possessing authority to resolve the issues of fact." *People v. Wharton*, 46 N.Y. 2d 924 (1979).

The controlling decision of the State of New York, Appellate Division, Fourth Department, herein, stated that the judgment below was "rendered on the law and the facts." *People v. Guzman*, 551 N.Y.S. 2d 709 (N.Y. App. Div. 1990). The decision then went on to state that the determination was because "... the police officer's conduct exceeded the permissible constitutional bounds and Defendant's conduct did nothing to arouse the officer's suspicion that he was engaged in criminal activity." Each of these determinations is clearly based upon a review of facts as they occurred. *Id.* at 710.

In the first instance, the Court quite correctly determined that the State Trooper requested permission "to look in the car" and when granted permission to do so, he then proceeded to conduct a full scale search of the vehicle. This was simply a finding by the Court that based upon the facts, the Defendant granted permission to "look in the car" but that such a statement does not constitute a waiver of the Defendant's constitutional rights. *Guzman* at 712. But it was not on this fact alone

that the Court made its determination that "consent to search" herein was not granted, and certainly not granted voluntarily.

The Court found factually that "Defendant was removed from his vehicle, separated frm his companions and questioned about subjects unrelated to the speeding violation for which he was stopped. Defendant was not advised of his right to refuse consent and although such advise is not mandatory, it is a factor to consider in determining whether Defendant's consent was voluntary." The Court then concluded that based upon these facts and the very limited permission granted that "Defendant's legal and constitutional rights were violated." *Id.* at 712.

The second determination was based upon an examination of the facts as they occurred following the stop for speeding and the conclusion that the facts presented were not such as to provide a basis for a finding of probable cause by the officer that the Defendant was engaged in criminal activity. The Court found that "Defendant adequately responded to the officer's questions, produced his license upon request and the officer ascertained that the vehicle was not stolen." *Id.* at 711.

Based upon the principles enunciated in *People v. Harrison*, and thereafter followed in *People v. Butler*, 58 N.Y. 2d 1056 (1983); *People v. Greene*, 64 N.Y. 2d 850 (1985) and *People v. Benthall*, 65 N.Y. 2d 679 (1985) the appeal herein to the State of New York, Court of Appeals did not lie and was correctly dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should not grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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